United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

November 25, 2019

Ms. Laura A. Foggan
Crowell & Moring, L.L.P.
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595

No. 19-20430 Landry's, Incorporated v. Ins Co of the State of PA
USDC No. 4:18-cv-2679

Dear Ms. Foggan,

You must submit the 7 paper copies of your brief required by 5th Cir. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1. Failure to timely provide the appropriate number of copies may result in the dismissal of your appeal pursuant to 5th Cir. R. 42.3. Exception: As of July 2, 2018, Anders briefs only require 2 paper copies.

If your brief was insufficient and required corrections, the paper copies of your brief must **not** contain a header noting "RESTRICTED". Therefore, please be sure that you print your paper copies **from this notice of docket activity** and not the proposed sufficient brief filed event so that it will contain the proper filing header. Alternatively, you may print the sufficient brief directly from your original file without any header.

Sincerely,

LYLE W. CAYCE, Clerk

Jann Wynne

By: _____
Jann M. Wynne, Deputy Clerk
504-310-7688

cc: Mr. Andrew W. Guthrie
Mr. Benjamin Lee Mesches
Ms. Mariah Baker Quiroz
Mr. Micah Ethan Skidmore
Ms. Ellen Mary Van Meir

No. 19-20430

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LANDRY'S, INC., AS SUCCESSOR IN INTEREST TO LANDRY'S MANAGEMENT, LP,

***Plaintiff-Appellant*,**

v.

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

***Defendant-Appellee*.**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION
Case No. 4:18-cv-02679, HON. KEITH ELLISON, PRESIDING

BRIEF OF APPELLEE THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Laura A. Foggan
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 624-2500
Fax: (202) 628-5116

Ellen Van Meir
Mariah B. Quiroz
THOMPSON, COE, COUSINS & IRONS, LLP
700 N. Pearl St., 25th floor
Dallas, Texas 75201
Tel: (214)871-8200
Fax: (214) 871-8209
Counsel for Appellee The Insurance Company of the State of Pennsylvania

CERTIFICATE OF INTERESTED PERSONS

No. 19-20430; *Landry's, Incorporated, as Successor in Interest to Landry's Management, LP, Plaintiff – Appellant v. The Insurance Company of the State of Pennsylvania, Defendant – Appellee.*

The undersigned counsel of record for The Insurance Company of the State of Pennsylvania ("ICSOP") certifies that the following listed persons and entities have an interest in the outcome of the case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal, in accordance with 5th Circuit Rule 28.2.1.

Plaintiff-Appellant: Landry's, Inc., as Successor in Interest to Landry's Management, LP ("Landry's).

Counsel for Plaintiff-Appellant

Haynes and Boone, LLP (Attorneys for Plaintiff-Appellant)
Micah E. Skidmore
Benjamin L. Mesches
Andrew W. Guthrie
Natalie Dubose

Other Interested Parties as to Plaintiff-Appellant

Fertitta Entertainment Holdings, Inc. (corporate affiliate)
Fertitta Entertaining Holdings, LLC (corporate affiliate)
Fertitta Entertainment, Inc. (corporate affiliate)
Landry's parent is Golden Nugget, LLC. No publicly held corporation owns 10% or more of Landry's stock.

Defendant-Appellee: The Insurance Company of the State of Pennsylvania ("ICSOP")

Counsel for Defendant-Appellee

Crowell & Moring LLP (Attorneys for Defendant-Appellee)
Laura A. Foggan

Thompson, Coe, Cousins & Irons, LLP

Ellen Van Meir
Mariah B. Quiroz

Other Interested Parties as to Defendant-Appellee

ICSOP is a direct, wholly-owned (100%) subsidiary of AIG Property Casualty U.S., Inc., which is a wholly-owned (100%) subsidiary of AIG Property Casualty Inc., which is a wholly-owned (100%) subsidiary of American International Group, Inc., which is a publicly-held corporation. No parent entity or publicly-held entity owns 10% or more of the stock of American International Group, Inc.

Trial Judge

The Honorable Keith P. Ellison (United States District Judge for the Southern District of Texas).

s/ Laura A. Foggan
Attorney of Record for Appellee
The Insurance Company of the
State of Pennsylvania

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. Civ. P. 34, ICSOP respectfully submits that oral argument may help the Court resolve the issues in this case, which turn on the plain language of the insurance policies and fundamental principles of contract interpretation under Texas law. ICSOP asks the Court to affirm the district court's determination that there is no "personal and advertising injury" coverage for a lawsuit filed against ICSOP's insured, Landry's, by Landry's payment card processor, Paymentech, LLC and JP Morgan Chase Bank, N.A. (collectively "Paymentech"). Oral argument will clarify why an alleged breach of Landry's payment card processing contract with Paymentech does not constitute "oral or written publication, in any manner, of material that violates a person's right of privacy," pursuant to the "personal and advertising injury" coverage in the ICSOP policies. At oral argument, ICSOP will further demonstrate that there is no coverage because Paymentech seeks to recover for Landry's alleged breach of contract, and Paymentech's lawsuit does not seek damages due to a "publication" of "material that violates a person's right of privacy." Given the novel and confounding arguments Landry's asserts in seeking to overturn the decision below, oral argument may be helpful to the Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

ICSOP agrees with the jurisdictional statement set forth in Landry's brief. Brief of Appellant ("App. Br.") at 2. *See* 28 U.S.C. §§ 1291, 1332(a)(1); Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

This appeal raises the following issues:

(1) Did the district court correctly grant ICSOP summary judgment on the grounds that a lawsuit based on its insured Landry's alleged breach of contract is not covered because the suit did not seek damages because of "oral or written publication" of material?

(2) Did the district court correctly grant ICSOP summary judgment on the grounds that a lawsuit based on its insured Landry's alleged breach of contract is not covered because the suit does not seek damages because of "material that violates a person's right of privacy"?

(3) Did the district court correctly deny Landry's partial summary judgment motion claiming ICSOP breached a duty to defend?

STATEMENT OF THE CASE

This case involves the question of whether coverage exists for a suit filed against Landry's because of its alleged breach of a contract with Paymentech. Paymentech sued Landry's for refusing to indemnify it for certain assessments two

credit card companies imposed on Paymentech following a 2015 data breach that allegedly occurred at multiple Landry's restaurant locations.[1]

A. Landry's Agreement With Paymentech

Paymentech is the payment processing arm of JP Morgan Chase Bank, which has membership agreements with credit card companies such as Visa and MasterCard (collectively "Payment Brands"). (ROA.262.) Through those membership agreements, Paymentech executes payment card transactions for Landry's and other merchants under merchant payment card processing agreements. (ROA.262-263.)

Paymentech and Landry's entered into a Select Merchant Payment Card Processing Agreement (the "Agreement") wherein Paymentech agreed to provide payment card processing services to Landry's for transactions processed at Landry's properties (which include restaurants such as Bubba Gump, McCormick & Schmick's, and Rainforest Café, among others). (ROA.263, 265.) In return, Landry's agreed to abide by the Agreement's "Payment Brand Rules," which included Visa's Global Compromised Account Recovery Program ("GCAR") and

---

[1] ICSOP and Landry's present the allegations in the suit by Paymentech at face value for purposes of this appeal. Landry's disputes the underlying allegations and continues to litigate those issues with Paymentech. By reporting the allegations here, ICSOP makes no admission or endorsement of the truth of the allegations against Landry's.

MasterCard's Account Data Compromise Program ("ADC"). (ROA.263.) These programs are intended to compensate issuing banks for a portion of the costs associated with a large scale credit card data compromise. (ROA.263-264.) The Payment Brand Rules also require compliance with "Security Guidelines" that incorporate industry standards regarding the transmission of credit card information. (ROA.264.)

Under the Agreement, Landry's was contractually obligated to indemnify Paymentech if Landry's failed to comply with the Payment Brand Rules and Security Guidelines, leading to assessments, fines or penalties by the Payment Brands. (ROA.264.)[2] Moreover, Paymentech has stated that "[t]his obligation to indemnify … Paymentech was not conditioned upon any determination that the assessments, fines or penalties imposed by the Payment Brands were either

---

[2] Paragraph 11.2 of the Agreement provides, in relevant part:

> 11.2 Merchant. You agree to indemnify Paymentech, … from any losses, liabilities, and damages of any and every kind (including, without limitation, our costs, expenses and reasonable attorney's fees) arising out of any claim, complaint, or Chargeback … (II) caused by your noncompliance with this Agreement, the Operating Guide, or the Payment Brand Rules, including any breach of a representation or warranty made by you.

(ROA.282.) Landry's was not obliged to indemnify any claim or complaint to the extent it was caused by Paymentech's own negligence or willful misconduct. (ROA.282.)

undisputed or subsequently determined to be legitimate. Nor was this obligation to indemnify . . . Paymentech conditioned upon whether Landry's agreed with the assessments or not." (ROA.273.)

B. The Credit Card Data Breach

Paymentech states that it discovered that a credit card data breach had taken place at several of Landry's properties in early December 2015. (ROA.265.) On December 17, 2015, Landry's issued a press release notifying the public and Landry's customers of the breach and reported that Landry's was implementing "enhanced payment system changes which would encrypt the credit card data throughout [its] processing system." (ROA.265.) Landry's issued a second press release on January 29, 2016, reporting that a "program" had been installed on the payment processing devices at certain Landry's Properties for several months between May 2014 and December 2015. (ROA.265-266.) That "program" reportedly searched for data from the magnetic stripe of payment cards that had been swiped as the data was being routed through affected systems. (ROA.266.)

C. Visa and MasterCard Assessments

Visa and MasterCard each conducted their own investigations of the security lapse. (ROA.267-271.) Visa concluded that the data breach was subject to the GCAR program and advised Paymentech of an assessment of $12,628,367.13. (ROA.267.) Paymentech notified Landry's of the Visa assessment and requested

reimbursement in accordance with their Agreement. (ROA.267.) Under the GCAR procedures, Landry's requested an appeal of Visa's assessment. Visa denied the appeal, determining that Landry's had failed to comply with multiple Payment Card Industry Data Security Standards. (ROA.271.) Visa then debited the $12,628,367.13 amount from Paymentech in March 2018, plus an additional $50,000.00 fee for the costs associated with the appeal, for a total of $12,678,367.13. (ROA.268-269.)

Similarly, MasterCard found a violation of its ADC program and initially assessed $10,548,342.50 against Paymentech. (ROA.271.) Paymentech notified Landry's of MasterCard's assessment and Landry's requested that it be appealed. (ROA.270.) After the appeal, MasterCard issued a final total assessment of $7,383,839.75 against Paymentech. (ROA.271.)

Paymentech then sent Landry's a demand letter, requesting that Landry's indemnify it for the total amount of $20,062,206.88 in assessments from Visa and MasterCard. (ROA.272.) In response, Landry's took the position that it had no obligation to indemnify Paymentech for the GCAR and ADC assessments. (ROA.272.)

D. The Paymentech Lawsuit

In May 2018, Paymentech sued Landry's for breach of contract based on its refusal to indemnify Paymentech, as agreed in their payment card processing

contract, for the assessments Visa and MasterCard imposed based on Landry's alleged failure to properly secure credit card information at several Landry's properties ("Paymentech Lawsuit"). *Paymentech, LLC and JPMorgan Chase Bank, N.A., v. Landry's as Successor-in-Interest to Landry's Management, LP*, Civil Action No. 4:18-cv-1622, (S.D. Texas). (ROA.261.)

As the complaint makes clear, the action is a breach of contract case:

> This breach of contract case concerns Landry's refusal to indemnify Chase Paymentech after final assessments were imposed arising out of a significant data breach at numerous Landry's properties in several states as early as May 2014 until December 2015. Despite the clear and unambiguous language of the contract between Landry's and Paymentech, Landry's refuses to indemnify Chase Paymentech for these assessments, forcing Chase Paymentech to bring this lawsuit.

(ROA.262.)

Paymentech alleges that Landry's breached their Agreement by failing to pay the $20,062,206.88 in assessments from Visa and MasterCard. (ROA.274.) Specifically, the Paymentech Lawsuit alleges that following the data breach, Landry's indemnification obligation under the Agreement was triggered. Landry's, however, refused to indemnify Paymentech. (ROA.273.) Paymentech asserts that it incurred damages in the total amount of the assessments, plus its attorney's fees under Texas Civil Practice & Remedies Code §38.001(8), and Sections 11 and 12 of the Agreement. (ROA.274.)

In the alternative, Paymentech seeks recovery under the theory of quantum meruit, contending that Landry's will be "unjustly enriched" by its acceptance of Paymentech's services if it fails to reimburse Paymentech for the assessments paid to Visa and MasterCard. (ROA.274-275.) Paymentech also seeks recovery based on promissory estoppel, because Landry's promised to reimburse Paymentech for the assessments, fines or penalties imposed by the Payment Brands. (ROA.276.)

E. The ICSOP Policies

Landry's seeks coverage for the Paymentech Lawsuit under the "Personal and Advertising Injury Liability" coverage part of four commercial general liability insurance policies issued by ICSOP to Fertitta Entertainment Holdings, Inc., Fertitta Entertainment Holdings, LLC and/or Fertitta Entertainment, which cover Landry's as a named insured:

1) Policy number 192-97-17 effective from September 24, 2013 to September 24, 2014, subject to a $500,000 per offense retained limit;

2) Policy number 192-97-17 effective from September 24, 2014 to September 24, 2015, subject to a $500,000 per offense retained limit;

3) Policy number 192-97-19 effective from September 24, 2013 to September 24, 2014, subject to a $1,000,000 per offense retained limit;

4) Policy number 192-97-19 effective from September 24, 2014 to September 24, 2015, subject to a $1,500,000 per offense retained limit.

(ROA.509, 626, 758, 864.) (hereinafter "ICSOP Policies").

Under each policy, the insuring agreement for Coverage B, as modified by the Self-Insured Retention ("SIR") Endorsement, provides, in part:

> a. We will pay on behalf of the Insured those sums in excess of the "Retained Limit" that the Insured becomes legally obligated to pay as damages *because of "personal and advertising injury" to which this insurance applies*.

(ROA.518, 614-15, 639, 648, 767, 857-858, 882, 946-47.) (Emphasis added.)[3]

"Personal and Advertising injury" is defined as follows:

> 14. "Personal injury and advertising injury" means injury, including consequential "bodily injury," humiliation, mental anguish or shock, arising out of one or more of the following offenses:
>
> a. False arrest, detention or imprisonment;
> b. Malicious prosecution;
> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
> d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
> e. *Oral or written publication, in any manner, of material that violates a person's right of privacy*;
> f. The use of another's advertising idea in your "advertisement"; or
> g. Infringing upon another's copyright, trade dress or slogan in your "advertisement."

---

[3] It further provides, "We will have the right but not the duty to defend any 'suit' seeking those damages." (ROA.518, 614-15, 639, 648, 767, 857-858, 882, 946-47.) As ICSOP explains below, there is no duty to defend under the ICSOP Policies, which is an independent reason why denial of Landry's motion for partial summary judgment should be affirmed.

(ROA.579, 713, 821, 941.) (Emphasis added.)

Further, under each of the ICSOP Policies, the insuring agreement for Coverage B was modified by the Self-Insured Retention ("SIR") Endorsement.[4] The SIR Endorsement was annexed to that ICSOP policy and was approved for use in Texas when the policy was issued. *See* Affidavit of Richard Chapman dated Dec. 14, 2018, ¶4 (ROA.1075). Further, the ICSOP policies were written and sold as part of a self-insured retention program. *Id*. ¶8. (ROA.1076.) The insured has satisfied, without dispute, the required per occurrence or "offense" self-insured retention in over 35 other claims made in multiple states under the 2013-2014 ICSOP Policy. *See Id*., ¶10. (ROA.1077.)

The SIR Endorsement provides with respect to defense:

> a. [. . .] *We will have the right but not the duty to defend any "suit" seeking those damages.* We may at our discretion and expense, participate with you in the investigation of any "occurrence" and the defense or settlement of any claim or "suit" that may result. But:
>
> (1) The amount we will pay for damages is limited as described in SECTION III - LIMITS OF INSURANCE; and
>
> (2) Our right to defend, if we so exercise it, ends when we have exhausted the applicable limit of insurance in the payment of

---

[4] Landry's contests whether the SIR Endorsement applies to the 2013-2014 ICSOP Policy. App. Br. at 35-36. In any event, however, potential coverage is never triggered under any of the ICSOP Policies because Paymentech's claims do not allege a covered "personal and advertising injury" offense.

> judgments or settlements under Coverages A or B or medical expenses under Coverage C.
>
> No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under ALLOCATED LOSS ADJUSTMENT EXPENSES - COVERAGES A AND B.

(ROA.767, 882.) (Emphasis added.) Significantly, the SIR Endorsement amends the ICSOP Policies' insuring agreements by removing the duty to defend and giving ICSOP "the right but not the duty to defend." (ROA.767, 882.)

F. The Coverage Dispute

Landry's sought coverage under the "personal and advertising injury" coverage part of the ICSOP Policies, contending that the Paymentech Lawsuit seeks damages because of the "publication… of material that violates a person's right of privacy." (ROA.1265.) ICSOP concluded that the Paymentech Lawsuit against Landry's is not covered under the ICSOP Policies. (ROA.1085.)

Landry's then brought this suit in Texas state court alleging that ICSOP's denial of coverage was wrongful. (ROA.16.) ICSOP removed the case to the United States District Court for the Southern District of Texas, Houston Division. (ROA.6.) Landry's moved for partial summary judgment that ICSOP has a duty to defend under the 2013-2014 ICSOP Policy, and ICSOP cross-moved for summary judgment on all of Landry's claims under all of the ICSOP Policies. (ROA.101, 456.) The district court denied partial summary judgment to Landry's and granted

summary judgment to ICSOP, holding that a plain reading of the contract language shows that the ICSOP Policies do not cover the Paymentech Lawsuit. (ROA.1265.)

Specifically, the district court held that there was no coverage because (1) the Paymentech Lawsuit did not involve an "oral or written publication" because Landry's did not publish information but rather "[a] third party hacked into Plaintiff's credit card processing system and stole customers' credit card information"; and (2) the damages sought by Paymentech were not invasion of "privacy" damages. (ROA.1269.) Instead, the court recognized that "these damages stem from [Landry's] breach of contract with the payment processor arising from its alleged failure to follow industry standards relating to the transmission of credit card information." (ROA.1269-1270.)

STANDARD OF REVIEW

Landry's appeals the district court's grant of summary judgment for ICSOP and denial of partial summary judgment for Landry's. The Court's review of the district court's ruling granting summary judgment is de novo. *Gregory v. Tenn. Gas Pipeline Co.*, 948 F.2d 203, 205 (5th Cir. 1991).

SUMMARY OF ARGUMENT

The district court correctly granted summary judgment to ICSOP on the grounds that the ICSOP Policies do not cover the Paymentech Lawsuit. Coverage

applies only to "personal and advertising injury" caused by an offense as defined by the ICSOP Policies. The "personal and advertising injury" offense at issue requires "publication," and further requires that the suit be for injury arising out of "violat[ion of] a person's right of privacy." Neither of these two independent prerequisites to coverage is present here.

Under Texas law, Landry's bears the burden of demonstrating that its claim falls within the ICSOP Policies' scope of coverage. *Nutmeg Ins. Co. v. Clear Lake City Water Auth.,* 229 F.Supp.2d 668, 676 (S.D. Tex. Feb. 24, 2002). In an effort to find coverage for this claim, Landry's urges the Court to disregard fundamental tenets of contract interpretation under Texas law. Landry's asks this Court to stretch the meaning of "publication" beyond recognition, and treat a corporate breach of contract dispute over indemnification payments as the equivalent of an action by an individual seeking compensation for a violation of his or her privacy. The Paymentech Lawsuit has nothing to do with an oral or written publication, or the vindication of the credit card account holders' privacy rights. Rather, the suit concerns the financial consequences of Landry's alleged failure to adhere to its Agreement with its payment card processor.

First, the enumerated offense that Landry's points to in the "personal and advertising injury" coverage of the ICSOP Policies requires *publication* of material in violation of a person's privacy rights. The "publication" requirement is not met

here, where the Paymentech Lawsuit is for indemnity owed by Landry's because of its alleged breach of a contractual Agreement. In fact, there is no "publication" at issue whatsoever. The Paymentech Lawsuit makes no allegation of "publication" and involves no dissemination of information to the general public.

Second, the Paymentech Lawsuit does not seek damages to compensate for the offense of violating a person's *privacy rights*. Far from bringing suit for damages to redress violation of a person's privacy rights, Landry's payment card processor seeks damages for breach of contract in Landry's failure to indemnify it for assessments levied by Visa and MasterCard. For this reason as well, the claim does not fall within the enumerated "personal and advertising injury" offense in the ICSOP Policies.

The Court should affirm summary judgment for ICSOP, and affirm the denial of partial summary judgment to Landry's on this basis. Further, Landry's partial summary judgment motion on the duty to defend was properly denied by the district court for the additional reason that the SIR Endorsement to the ICSOP Policies provides that ICSOP has no duty to defend, or at a minimum that there is a genuine issue of material fact as to whether any of the ICSOP Policy terms include a duty to defend.

ARGUMENT

"Personal and advertising injury" coverage under the ICSOP Policies is limited to injury arising out of a list of designated "offenses." *Decorative Center of Houston v. Employers Cas. Co.,* 833 S.W.2d 257, 262-263 (Tex. App.—Corpus Christi-Edinburg 1992, writ denied) (no "personal injury coverage" because acts alleged are not within the list of offenses covered); *Patel v. Northfield Ins. Co.,* 940 F.Supp. 995, 998 (N.D. Tex. 1996) (no duty to defend where none of the enumerated offenses under Coverage B were alleged in the underlying complaint).[5] Texas courts are clear that, for Coverage Part B to apply, the policyholder must establish the elements of the specific offense at issue. *Hettler v. Travelers Lloyds Ins. Co.,* 190 S.W.3d 52 (Tex. App.—Amarillo 2005) (no duty to defend where facts alleged did not assert claims for personal injury offense of "wrongful eviction" as defined by the policy).[6] Without violation of a "personal and advertising injury" offense enumerated in the policy, there is no coverage.

---

[5] Other jurisdictions are in accord. *E.g., Gregory v. Tenn. Gas Pipeline Co.*, 948 F.2d 203, 209 (5th Cir. 1991) (applying Louisiana law, finding no coverage existed under Coverage B for the wrongs asserted in the underlying complaint); *Whiteville Oil Co. v. Federated Mut. Ins. Co*., 87 F.3d 1310 (4th Cir. 1996) ("Unlike Coverage A which provides for coverage based on the harm suffered, Coverage B's applicability depends upon whether the injuries arose from one of the enumerated offenses listed in the policy.").

[6] *See also Mid-Continent Cas. Co. v. Camaley Energy Co., Inc*., 364 F.Supp.2d 600, 608 (N.D. Tex. 2005) (no personal injury offense of wrongful

(continued…)

Here, Landry's cannot prove that the Paymentech Lawsuit falls within the offense of "publication… of material that violates a person's right of privacy" for two independent reasons. First, Landry's cannot show that the Paymentech Lawsuit concerns "publication" of material. Second, Landry's cannot show that the suit seeks damages to redress the "violat[ion of] a person's right of privacy."

To make this determination, the Court must compare the factual allegations in Paymentech's complaint with the ICSOP policy language. *See, e.g., Everest Nat'l Ins. Co. v. Gessner Engineering, LLC,* 325 F.Supp.3d 760 (S.D. Tex. 2018), citing *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church,* 197 S.W.3d 305, 310 (Tex. 2006).[7]

I. LANDRY'S IS NOT ENTITLED TO COVERAGE BECAUSE THE PAYMENTECH LAWSUIT DOES NOT CONCERN A "PUBLICATION" OF MATERIAL.

Landry's cannot shoehorn the Paymentech Lawsuit into the Coverage B "personal and advertising injury" offense at issue because the Paymentech Lawsuit

---

(continued…)

eviction where at most alleged conduct constituted a constructive eviction); *Patel*, 940 F.Supp. at 998 (personal injury offenses of "wrongful eviction" and "invasion of a right of private occupancy" did not apply where claimants were not tenants, but mere licensees).

[7] Contrary to Landry's claims, this is not a duty to defend case and does not turn on whether the duty to defend is broader than the duty to indemnify. The ICSOP Policies provide a right but not a duty to defend (ROA.767, 882.), and any obligation relating to defense is limited to reimbursement of specified costs for covered claims. *Id.*

does not concern a "publication" of material. The Paymentech Lawsuit is a commercial dispute over indemnification, and does not contain any allegation that anyone published consumer credit card information to the public. Rather, the Paymentech Lawsuit turns on a payment processor Agreement under which Landry's committed to pay certain assessments its business partner might incur in the event of a data breach. The complaint centers on Landry's indemnity obligation, and alleges as background facts only that "Landry's allowed cardholder account data to be put at risk." Paymentech Complaint, ¶17 (ROA.265.)

There are no allegations in the Paymentech Lawsuit that the hacker published the stolen cardholder data. Nor did Landry's itself publish material in violation of any person's privacy rights. The failure to effectively secure information does not constitute "publication" under the terms of the ICSOP Policies. Putting information at risk is not public dissemination of that information,[8] and simply because information is at risk does not mean it has been or will ever be published to a third party. See *Recall Total Info. Mgt., Inc. v. Federal Ins. Co.,* 115 A.3d 458 (Conn. 2015) (affirming appellate court's finding

[8] Nor is Landry's conduct in transmitting cardholder information for purposes of processing payments a "publication" of material in violation of a person's privacy right. Such a transmission is neither public dissemination, nor an improper dissemination, of the data. Rather, it is precisely how payments are processed in the ordinary course of Landry's business.

of no "publication" for purposes of Coverage B where policyholder put data "at risk" because computer tapes containing personal information fell out of vendor's truck during transport).[9]

Tellingly, Landry's does not argue that the term "publication" is ambiguous. If the policy language is unambiguous, its plain meaning applies.[10] Under Texas law, nontechnical words in an insurance policy, such as "publication," are given their ordinary, everyday meaning to the general public. *Progressive Cty. Mut. Ins.*

---

[9] This Court need not decide whether a "personal and advertising injury" offense can be proven only through purposeful "publication" of material by the policyholder Landry's, as opposed to actions by a third party. Here, whether the Court focuses on the hacker's theft of the data or the policyholder's failure to protect the data, the data was not published — i.e., disseminated to the public — in either case. Noting the fact that Landry's did not publish any information, as well as the absence of any authority supporting the conclusion that theft of data by a third party is considered a publication, the district court held there was no "publication" for purposes of the "personal and advertising injury" offense at issue. As set forth in greater detail below, this position is well established and supported by the law. See *Innovak Int'l, Inc. v. Hanover Ins. Co.,* 280 F.Supp.3d 1340 (M.D. Fla. 2017) (claims alleging theft of personal information in data breach did not allege publication by the insured, and thus, did not allege covered "personal and advertising injury").

[10] Finding coverage for Paymentech's breach of contract claim against Landry's would require this Court to ignore, rather than give effect to, the plain language of the ICSOP policies. This dispute can and should be resolved by enforcing the plain policy terms. In this regard, the district court's recognition that there is a robust insurance market for cyber coverage specifically designed to address data breaches was not an improper consideration of "extrinsic evidence" as Landry's seems to urge. (ROA.1269.) It is simply a fact that different insurance products are designed for different risks, and that insurers and policyholders understand this. That is the context for the words they choose. The ICSOP Policies here speak for themselves.

Co. v. Sink, 107 S.W.3d 547, 551 (Tex. 2003). Texas courts hold that there is no "publication" within the meaning of an insurance policy unless the disclosure of private information is, on some level, of a "public" nature. *Nutmeg Ins. Co. v. Employers Ins. Co. of Wausau, No. 3:04-cv-1762B,*, 2006 WL 453235, *9 (N.D. Tex. Feb. 24, 2006). In other words, the plain meaning of the term "publication" includes an element of public distribution. As other courts have explained, the plain meaning of the term "publication" is the "act of declaring or announcing to the public," "to disseminate to the public," or materially similar definitions. *See, e.g., Recall Total Info. Mgt., Inc. v. Federal Ins. Co.,* 115 A.3d 458 (Conn. 2015) (affirming appellate court's finding that policyholder's loss of personal information did not constitute a "publication" for purposes of Coverage B coverage); *Whole Enchilada, Inc. v. Travelers Prop. Cas. Co. of Am.*, 581 F.Supp.2d 677, 697 (W.D.Pa. 2008) (publication requires dissemination to the public at large; underlying complaint did "not allege that [the policyholder] is liable for 'publication'" where plaintiffs only received their own personal information on credit card receipts); *Ticknor v. Rouse's Enterprises, LLC*, 2 F.Supp.3d 882, 896 (E.D. La. 2014) (for "publication" to occur, the material must be "made generally known, announced publicly, disseminated to the public, or released for distribution"); *Terra Nova Ins. Co. v. Fray-Witzer*, 869 N.E.2d 565, 572 (2007) (communication required a "public announcement"). In each of these cases,

"publication" – to announce, to disseminate, to communicate, to distribute – required affirmative steps to distribute material to the public.[11]

The United States Courts of Appeals for the Third Circuit and the Eleventh Circuit also agree. *OneBeacon Am. Ins. Co. v. Urban Outfitters, Inc.*, No. 14-2976, 2015 WL 5333845, at *2 (3d Cir. Sept. 15, 2015) (emphasizing that words in an insurance policy must be given their natural, plain and ordinary sense, and holding that "publication requires dissemination to the public at large"); *Creative Hospitality Ventures, Inc. v. U.S. Liab. Ins. Co*., 444 Fed. App'x 370, 375-76 (11th Cir. 2011) (the phrase "publication, in any matter" is unambiguous and does not apply when there was no dissemination of information to the public). The Paymentech Lawsuit contains no allegations of dissemination of information to the general public. Landry's tries to evade Texas's plain meaning rule by conflating the meaning of the term "publication" with the medium of publication. Landry's mistakenly contends that the phrase "publication, *in any manner*" "is broad enough

[11] Landry's cites a handful of cases involving "blast faxes" to urge that communication to the public, or any third-party, is not required. In those cases, the courts ruled that the insured's transmittal of advertising material in a blast fax to each of thousands of recipients may be a publication. But an insured's liability for invasion-of-privacy as a result of sending unsolicited facsimiles is not analogous to the facts at issue here, and the courts' analyses were tied to the elements of the distinct tort of intrusion upon seclusion. *E.g., Western Rim Investment Advisors v. Gulf Ins. Co.*, 269 F. Supp. 2d 836, 846 (N.D. Tex. 2003), *aff'd*, 96 F. App'x 960 (5th Cir. 2004).

to include any transmission of words or information to a third party," including the theft – *i.e.*, the taking – of such information by a third-party hacker. App. Br. at 12. That is simply not supported by the ICSOP Policies or the law.

Significantly, the ordinary and generally accepted meaning of the term "publication" does not include being a victim of theft or the act of a thief taking information for his or her own use. Treating a theft as a publication contorts the policies' coverage and subverts the plain meaning of "publication." Just as the Connecticut Supreme Court in *Recall Total Information Management* held that the loss of personal information (where tapes fell out of a truck traveling on the road) did not constitute "publication" of it, similarly the theft of unsecure information does not constitute "publication" of that information. 115 A.3d at 460.

Landry's further bases its argument on a hypothetical situation not applicable here. Landry's argues that the phrase "in any manner" means that the "publication" element of the offense of "oral or written publication, in any manner, of material that violates a person's right of privacy" is met *if* a third-party hacker, who has stolen private data, transmits it to a third party (such as a retailer). Landry's argument, however, is a red herring. Even assuming *arguendo* that such a transmission of data would constitute a "publication," and that the ICSOP Policies would cover publication by a hacker, as opposed to an insured, there are

no allegations in the Paymentech Lawsuit that the hacker transmitted the information to third-parties. (*See* ROA.261-278,)

Further, Landry's interpretation of the phrase "in any manner" has been addressed and rejected by multiple courts. Landry's argument that the phrase "in any manner" guts the "public" nature of the term "publication" is simply wrong. As the Eleventh Circuit explained in *Creative Hospitality Ventures,* 444 Fed. App'x at 375-76, "[w]e likewise reject ETL's argument that the phrase 'in any manner' expands the definition of 'publication' … [T]he phrase 'in any manner' merely expands the category of publication (such as email, handwritten letters, and perhaps, 'blast-faxes') covered by the Policy."

In *Innovak*, 280 F. Supp. 3d at 1348, a policyholder argued that "publication" took place when a third-party hacker allegedly stole claimants' private data and then stored it on a software database. The court disagreed, observing:

> The Court notes that Innovak materially mischaracterizes the allegations of the Underlying Complaint. Nowhere in the Underlying Complaint do the Underlying Claimants contend that their [private data] was "published," whether by third party hackers or by Innovak.
>
> * * *

> Here, the Underlying Claimants do not allege that their [private information] was ever made publicly accessible by Innovak.[12]

280 F.Supp.3d at 1347. The court explicitly rejected the notion that the phrase "publication, in any manner" was broad enough to encompass the policyholder's allegedly negligent failure to prevent a third-party hacker from obtaining the claimants' personal information. *Accord St. Paul Fire & Marine Ins. Co. v. Rosen Millennium, Inc.,* 337 F.Supp.3d 1176 (M.D. Fla. 2018), *appeal pending* (11th Cir.).

Landry's similarly mischaracterizes the complaint in the Paymentech Lawsuit, which nowhere alleges that a publication occurred, by Landry's *or* a third-party hacker.[13] The Paymentech Lawsuit against Landry's is devoid of allegations that anyone's private information was published or provided to the public at large, through any medium. (*See* ROA.261-278.)[14] In the absence of a

---

[12] Notably, unlike the Paymentech Lawsuit here, the underlying lawsuit in *Innovak* was brought by persons whose privacy rights were allegedly violated.

[13] The Paymentech complaint alleges: "In sum, the investigation confirmed that Landry's allowed cardholder account data to be put at risk as a result of the Data Breach." Paymentech Compl., ¶ 17. (ROA.265.) *See also* Paymentech Compl.,¶ 51 (alleging that Landry's obligation to indemnify Paymentech was not conditioned on whether the assessments were determined to be legitimate, or on whether Landry's agreed with the assessments or not). (ROA.273.)

[14] E.g.*, Whole Enchilada, Inc*., 581 F.Supp.2d at 696-97 (no "publication" where information was not "made generally known, publicly announced, [] or disseminated to the public" where underlying complaint only alleges that the

(continued…)

publication, Landry's cannot show that the Paymentech Lawsuit alleges the enumerated "personal and advertising injury" offense of *publication* of material that violates a person's right to privacy.

II. LANDRY'S IS NOT ENTITLED TO COVERAGE BECAUSE THE PAYMENTECH LAWSUIT DOES NOT SEEK DAMAGES FOR THE VIOLATION OF A PERSON'S PRIVACY.

Landry's cannot demonstrate that the Paymentech Lawsuit falls under the "personal and advertising injury" offense of "publication of material . . .that violates a person's right of privacy" for a second, independent reason. The Paymentech Lawsuit concerns Landry's alleged breach of contract for failing to indemnify Paymentech for assessments levied by Visa and MasterCard. It does not seek damages to redress a violation of a person's – any person's – right of privacy. Simply put, the Paymentech Lawsuit does not seek to recover damages for, and does not arise out of, "[o]ral or written publication, in any manner, *of material that violates a person's right of privacy*."

(continued…)

information was provided to [the claimants] in violation of FACTA"); *Creative Hospitality Ventures*, 444 Fed. App'x at 375-76 (no "publication" where claimants' personal information was provided on a written receipt). *See also Recall Total Info. Mgmt. v. Fed. Ins. Co*., 83 A.3d 664, 672 (Conn. Ct. App. 2013) (no "publication" where record was "entirely devoid of facts suggesting that personal information was accessed"), *aff'd* 115 A.3d 458 (Conn. 2015). *Cf. Travelers Indem. Co. of Am. v. Portal Healthcare Solutions, LLC*, 644 Fed.Appx. 245 (4th Cir. 2016) (publication of medical records on the internet was a publication).

Specifically, the Paymentech Lawsuit was not brought by the individual credit cardholders, and does not seek damages (such as direct financial loss or reduced credit scores) for those whose accounts were compromised in the data breach. Nor does it otherwise directly or indirectly seek damages for any violation of their privacy. The complaint clearly defines the contours of the claims – *Paymentech's* claims – through which it seeks indemnification under the credit card processing Agreement, or recovery through quantum meruit or unjust enrichment, of the amount of assessments imposed on Paymentech.

As *P.F. Chang's China Bistro, Inc. v. Federal Ins. Co.,* No. CV-15-1322-PHX-SMM, 2016 WL 3055111 (D.Ariz. May 31, 2016), made clear, a lawsuit against a policyholder by its payment card processor for indemnification of assessments imposed by Visa and MasterCard due to a lapse in security does not seek recovery for a "privacy injury." In *P.F. Chang's*, the court recognized that the payment processor did not sustain a "privacy injury" itself and could not maintain a valid claim for such an injury against P.F. Chang's. Here, too, Paymentech did not sustain a privacy injury, and has not brought (and cannot bring) such a claim against Landry's.

Landry's ignores the actual basis for the Paymentech Lawsuit – the money allegedly lost by Paymentech, and the financial windfall to Landry's, due to its failure to pay assessments as promised in the Agreement. There is no offense of

publication of material that violates a person's *right of privacy* at issue. A simple review of the causes of action in the Paymentech Lawsuit, and the elements of each, drives this point home.

Count I of the Paymentech Lawsuit is for Breach of Contract. Under Texas law, the elements of a breach of contract claim require Paymentech to prove that: (1) the Agreement is a valid and enforceable agreement between Paymentech and Landry's; (2) Paymentech fully performed in accordance with the terms of the Agreement; (3) the Agreement obligated Landry's to indemnify and reimburse Paymentech for any assessments, fines, or penalties imposed on it arising out of the GCAR or ADC programs, without regard to whether Landry's agreed with those assessments;[15] (4) assessments were imposed on Paymentech under the GCAR and ADC programs, triggering the duty of Landry's to indemnify it; (5) Landry's failed to pay Paymentech the amounts assessed; and (6) as a result, Paymentech suffered damages in the amount of the unreimbursed assessments, fines, and penalties. *See Steward v. Sanmina Texas LP*, 156 S.W.3d 198, 214 (Tex. App.—Dallas 2005, no pet.).

---

[15] Paragraph 13 of the Paymentech Lawsuit explicitly alleges that Landry's contractual obligation to indemnify Paymentech for any assessments "was not conditioned upon any other events such as any determination that the assessments, fines or penalties imposed by the Payment Brands were undisputed by Landry's or subsequently determined by Landry's to be legitimate." (ROA.264.)

Count II of the Paymentech Lawsuit is for Quantum Meruit. Under Texas law, the elements of a quantum meruit claim require Paymentech to prove that: (1) it provided valuable payment card processing services or materials to Landry's; (2) Landry's accepted those services or materials; and (3) under such circumstances as would reasonably notify Landry's that Paymentech expected to be reimbursed for any assessments imposed on it by the Payment Brands. *See Speck v. First Evangelical Lutheran Church of Hous*., 235 S.W.3d 811, 815 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

Count III of the Paymentech Lawsuit is for Unjust Enrichment. Under Texas law, the elements of an unjust enrichment claim require Paymentech to prove: (1) a promise by Landry's to reimburse Paymentech for assessments imposed by the Payment Brands; (2) it was foreseeable that Paymentech would rely on that promise; and (3) Paymentech did substantially rely on the promise to its detriment by materially changing its position in reliance on Landry's promise. *See MetroplexCore, LLC. v. Parsons Transp., Inc.*, 743 F.3d 964, 977 (5th Cir. 2014) (*citing English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983)).

As is evident from the above, Paymentech does not need to (and does not seek to) establish a publication of material violating the privacy rights of any person, including any particular credit cardholder, in order to prove its claims against Landry's. According to the allegations in the Paymentech Lawsuit,

Paymentech's claim arose out of Landry's agreement to indemnify it in the payment processing Agreement, and the business relationship between Landry's and Paymentech on which Paymentech's quantum meruit and unjust enrichment claims are based. Simply put, the Paymentech Lawsuit arose out of the contractual Agreement and business relationship between Landry's and Paymentech.

Landry's seizes on references in the Paymentech Lawsuit to the victims of the credit card data compromise, and uses those references to try to bootstrap the claim against it into the covered offense of "publication of material ... that violates a person's right of privacy." But factual background regarding the credit cardholder victims of the data breach is not a necessary element of any theory of recovery asserted or damages sought by Paymentech. Mere references to the credit card data compromise in the Paymentech Lawsuit do not convert that suit into a covered claim.[16] The crux of Paymentech's claim is that Landry's agreed to indemnify it under the Payment Card Processing Agreement but in fact did not do so, *not* that there was a publication of material in violation of any person's right of

---

[16] Courts routinely reject "thinly disguised attempts to bootstrap liability" for uncovered claims into a policy's coverage. *See Zurich Am. Ins. Co. v. O'Hara Regional Center for Rehabilitation,* 529 F.3d 916, 923 (10th Cir. 2008). Moreover, even when looking beyond the theory of recovery to facts alleged, courts recognize that "factual allegations are only important insofar as they point to a theory of recovery." *Health Care Indus. Liab. Ins. Program v. Momence Meadows Nursing Ctr.*, 566 F.3d 689, 698 (7th Cir. 2009).

privacy. Landry's argument that the Paymentech Lawsuit arises out of the violation of a person's right to privacy – any person's right to privacy – is meritless, and unsupported by the law.

III. DENIAL OF PARTIAL SUMMARY JUDGMENT TO LANDRY'S, AND FINAL JUDGMENT FOR ICSOP, SHOULD BE AFFIRMED.

For the same reasons that this Court should affirm the judgment for ICSOP, it should affirm the denial of the narrower, partial summary judgment sought by Landry's below.[17] Landry's did not and cannot establish coverage because Landry's does not face liability for damages because of a "personal and advertising injury" offense under the ICSOP Policies. The Paymentech Lawsuit does not seek damages for injury arising out of "oral or written publication, in any manner, of material that violates a person's right of privacy." As shown above, the Paymentech Lawsuit is a breach of contract suit, for Landry's alleged breach of the Payment Card Processing Agreement.

This Court should affirm denial of partial summary judgment to Landry's for additional reasons, as well. All of the ICSOP Policies have SIR Endorsements requiring Landry's to satisfy a retained amount before ICSOP could possibly owe

---

[17] Unlike ICSOP's motion seeking summary judgment on all of Landry's claims, Landry's sought only partial summary judgment limited to whether ICSOP had a duty to defend the Paymentech Lawsuit under the 2013-2014 ICSOP Policy. (ROA.108.)

coverage to Landry's. (ROA.614-15, 639-42, 857-861, 946-49.) Significantly, these same SIR Endorsements also amend the policies' insuring agreements by removing the duty to defend and giving ICSOP "the right but not the duty to defend." (ROA. 614-15, 639, 857-858, 946-47.) Landry's thus erroneously contends that ICSOP breached a duty to defend under the 2013-2014 Policy when the SIR Endorsement to every ICSOP Policy unequivocally states that ICSOP has "the right but not the duty to defend." (ROA.518, 614-15, 639, 648, 767, 857-858, 882, 946-47.) Thus, ICSOP simply has no such duty – and therefore cannot breach such a duty – even for covered claims.

Landry's contests whether the SIR Endorsement is enforceable or applicable to the 2013-2014 ICSOP Policy. App. Br. at 36 (citing ROA.1054-1055.) But the SIR Endorsement was annexed to that ICSOP Policy and was approved for use in Texas when the policy was issued. *See* Aff. of Richard Chapman at ¶4 (ROA.1075.) Further, all the ICSOP policies were written and sold as part of a self-insured retention program, *Id.* at ¶8 (ROA.1076), and the insured has satisfied, without dispute, the required per occurrence or "offense" self-insured retention in over 35 other claims made in multiple states under the ICSOP 2013-2014 Policy. *Id*., ¶10 (ROA.1078.) Landry's attempt at obtaining summary judgment on the duty to defend, or at least contesting the application of the SIR Endorsement, including its terms providing that ICSOP has "the right but not the

duty to defend," is disingenuous.[18] ICSOP cannot breach a duty that the ICSOP Policies expressly state does not have, and Landry's is no stranger to the applicability of the SIR Endorsement at issue. Accordingly, ICSOP did not have – and could never have – a duty to defend Landry's for the Paymentech Lawsuit.

CONCLUSION

For the foregoing reasons, ICSOP respectfully requests that this Court affirm summary judgment for ICSOP and against Landry's. The "personal and advertising injury" coverage of the ICSOP Policies does not provide coverage to Landry's for the Paymentech Lawsuit.

Respectfully Submitted,

/s/ Laura A. Foggan

Laura A. Foggan
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

[18] Alternatively, ICSOP has shown that Landry's is not entitled to partial summary judgment on an alleged breach of the duty to defend because there is at a minimum a genuine dispute as to whether the 2013-2014 ICSOP Policy contains a duty to defend. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Fields v. City of South Houston, 922 F.2d 1183, 1187 (5th Cir. 1991). Notwithstanding, for the reasons set forth above, any such duty to defend would not be triggered because the Paymentech Lawsuit does not allege "personal and advertising injury."

Tel: (202) 624-2500
Fax: (202) 628-5116

Ellen Van Meir
Mariah B. Quiroz
THOMPSON, COE, COUSINS & IRONS, LLP
700 N. Pearl St., 25th floor
Dallas, Texas 75201-2832
Tel: (214)871-8200
Fax: (214) 871-8209

Counsel for The Insurance Company of the State of Pennsylvania

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk for the United States Court of Appeals for the Fifth Circuit by the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Counsel for Appellant Landry's, Incorporated

Micah Ethan Skidmore
Haynes & Boone, L.L.P.
Suite 700
2323 Victory Avenue
Dallas, TX 75219
micah.skidmore@haynesboone.com

Andrew W. Guthrie
Haynes & Boone, L.L.P.
Suite 700
2323 Victory Avenue
Dallas, TX 75219
andrew.guthrie@haynesboone.com

Benjamin Lee Mesches
Haynes & Boone, L.L.P.
Suite 700
2323 Victory Avenue
Dallas, TX 75219
ben.mesches@haynesboone.com

November 25, 2019

/s/ Laura A. Foggan
Laura A. Foggan

ECF CERTIFICATION

I hereby certify (i) the required privacy redactions have been made pursuant to Fifth Circuit Rule 25.2.13; (ii) the electronic submission is an exact copy of the paper document pursuant to Fifth Circuit Rule. 25.2.1; (iii) the document has been scanned for viruses using Symantec Endpoint Protection active scan and is free of viruses; and (iv) the paper document will be maintained for three years after the mandate or order closing the case issues, pursuant to Fifth Circuit Rule 25.2.9.

/s/ Laura A. Foggan
Laura A. Foggan

CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B), because this brief contains 7,001 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The "Word Count" function of Microsoft Word 2010 was used for this purpose.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fifth Circuit Rule 32.1 and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

November 25, 2019

/s/ Laura A. Foggan

Laura A. Foggan
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 624-2500
Facsimile: (202) 628-5116

Counsel for Appellee The Insurance Company of the State of Pennsylvania